

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

OCTOBER TERM, 1904.

No. 1436.

HENRY E. DAVIS, APPELLANT,

vs.

RICHARD W. SANDERS.

APPEAL FROM THE SUPREME COURT OF THE DISTRICT OF COLUMBIA.

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In the Court of Appeals of the District of Columbia.

HENRY E. DAVIS, Appellant, }
vs. } No. 1436.
RICHARD W. SANDERS. }

a Supreme Court of the District of Columbia.

RICHARD W. SANDERS, Plaintiff, }
vs. } No. 45265. At Law.
HENRY E. DAVIS, Defendant. }

UNITED STATES OF AMERICA, } ss:
District of Columbia, }

Be it remembered, that in the supreme court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had, in the above-entitled cause, to-wit:—

1 *Declaration and Rule.*

Filed March 3, 1902.

In the Supreme Court of the District of Columbia.

RICHARD W. SANDERS, Plaintiff, }
vs. } No. 45265. Law.
HENRY E. DAVIS, Defendant. }

The plaintiff sues the defendant in an action of debt for money payable by the defendant to the plaintiff.

1. For that heretofore, to wit, on the 26th day of February, 1896, in the State of Virginia, in a suit depending between the said plaintiff and the defendant impleaded with William H. Bolling, Joseph W. Caldwell, John P. M. Sanders, John J. A. Powell, Edmund Pendleton, Bolling F. Stanley, and Alexander H. Galt, in the circuit court of Wythe county, in the State of Virginia aforesaid, the same being a court of record of the said State, duly holden and having jurisdiction in that behalf, the plaintiff recovered against the defendant and the said William H. Bolling, Joseph W. Cald-

well, John P. M. Sanders, John J. A. Powell, Edmund Pendleton, Bolling F. Stanley, and Alexander H. Galt, by the judgment of said court and according to the laws of said State, the sum of \$6,000.00 with legal interest from October 1, 1891, until paid and \$16.26 costs of suit which judgment is still in full force and effect and unsatisfied, except nevertheless the sum of \$902.00, being interest paid on April 3, 1893, by the said John P. M. Sanders, Edmund Pendleton, J. J. A. Powell, and Bolling F. Stanley, and the sum of 2 \$167.00 paid by the said John P. M. Sanders on December 3, 1894, and the additional sum of \$500.00 paid by the said John P. M. Sanders on the 11th day of December, 1895, and the sum of \$1,500.00 paid by the said Edmund Pendleton on the first day of December, 1898, and the sum of \$1,274.43 paid by the said Bolling F. Stanley on the 25th day of September, 1899; the sum of \$319.78 paid January 15, 1900, and \$180.50 paid February 10, 1900, by W. E. Fulton, commissioner; and the plaintiff claims the said sum of \$6,000.00 with interest thereon from October 1, 1891, until paid, besides \$16.26 costs, less the credits aforesaid.

2. For that whereas, the said defendant and Alexander H. Galt, William H. Bolling, by the name of W. H. Bolling, Joseph W. Caldwell, by the name Jos. W. Caldwell, John P. M. Sanders, by the name J. P. M. Sanders, John J. A. Powell, by the name J. J. A. Powell, Edmund Pendleton, Bolling F. Stanley, by the name B. F. Stanley, on the 1st. day of October, 1891, at Wytheville, in the State of Virginia, by their certain writing obligatory, sealed with their seals, and to the court now here shown, the date whereof is the day and year aforesaid, jointly and severally promised to pay to the said plaintiff by the name R. W. Sanders, the sum of \$6,000.00 current money of the United States of America, on or before the 1st. day of October, in the year 1895, with legal interest thereon, payable semi-annually from October 1st, 1891, until paid; and the plaintiff further says that thereafter, to wit, on April 3, 1893, the said J. P. M. Sanders, Edmund Pendleton, John J. A. Powell, and Bolling F. Stanley paid 3 the sum of \$902.00, being interest in the writing obligatory aforesaid to the said 3rd day of April, 1893, and thereafter, to wit, on December 3, 1894, the said John P. M. Sanders, paid \$167.00 on account thereof, and thereafter, to wit, on the 11th day of December, 1895, the said John P. M. Sanders paid the sum of \$500.00 on account thereof, and thereafter, to wit, on the first day of December, 1898, the said Edmund Pendleton paid \$1,500.00 on account thereof, and thereafter, to wit, on the 25th day of September, 1899, the said Bolling F. Stanley paid \$1,274.43 and thereafter, to wit, on January 15, 1900, there was paid \$319.78 by W. E. Fulton, commissioner, and thereafter, to wit, on February 10, 1900, there was also paid by said commissioner the sum of \$180.50 said several sums being the net proceeds of certain real estate sold in proceedings to enforce payment of said note; nevertheless the said defendant although often requested has not paid to the said plaintiff the balance of said sum of money or any part thereof, but so to do hath hitherto

wholly refused and still does refuse, and the plaintiff, therefore brings this suit, and claims said sum of \$6,000.00 with interest thereon from October 1, 1891, less the sum of \$902.00 paid on April 3, 1893, as interest to said date, the sum of \$167.00 paid thereon December 3, 1894, the sum of \$500. paid thereon December 11, 1895, the sum of \$1,500.00 paid thereon December 1, 1898, the sum of \$1,274.43, paid thereon September 25, 1899, the sum of \$319.78 paid thereon January 15, 1900, and the sum of \$180.50 paid thereon February 10, 1900.

3. For goods sold and delivered by the plaintiff to the defendant; and for work done and materials provided by the plaintiff for the defendant at his request; and for money loaned by the plaintiff to the defendant; and for money paid by the plaintiff for the defendant

4 at his request; and for money received by the defendant for the use of the plaintiff; and for money found to be due from the defendant to the plaintiff on account stated between them. And the plaintiff claims the sum of \$6,000. with interest thereon from October 1, 1891, less the sum of \$902.00 paid on April 3, 1893, as interest to said date, the sum of \$167.00 paid thereon December 3, 1894, the sum of \$500.00 paid thereon December 11, 1895, the sum of \$1,500.00 paid thereon December 1, 1898, and the sum of \$1,274.43 paid thereon September 25, 1899, the sum of \$319.78 paid thereon January 15, 1900, and the sum of \$180.50 paid thereon February 15, 1900, according to the particulars of demand hereto annexed.

BRANDENBURG AND BRANDENBURG,

Attorneys for Plaintiff.

The defendant is to plead hereto on or before the 20th day exclusive of Sundays and legal holidays occurring after the service hereof; otherwise judgment.

BRANDENBURG AND BRANDENBURG,

Attorneys for Plaintiff.

5

Particulars of Demand.

\$6,000.00.

WYTHEVILLE, VA., October 1st, 1891.

On or before the 1st. day of October, A. D. 1895, we hereby, jointly and severally, promise to pay to R. W. Sanders six thousand dollars current money of the United States of America, with legal interest thereon payable semi-annually from October 1st. A. D. 1891, till paid, for value received of him; and we hereby severally waive our homestead exemption as to this obligation.

Witness our hands and seals, this the day and year first above written.

W. H. BOLLING.	[L. S.]
JOS. W. CALDWELL.	[L. S.]
J. P. M. SANDERS.	[L. S.]
J. J. A. POWELL.	[L. S.]
EDMUND PENDLETON.	[L. S.]
B. F. STANLEY.	[L. S.]
HENRY E. DAVIS.	[L. S.]
ALEXANDER H. GALT.	[L. S.]

Credits.

April 3, 1893 paid by J. P. M. Sanders, Edmund Pendleton, J. J. A. Powell and B. F. Stanley, as interest to said date, \$902.
 6 December 3, 1894 paid by J. P. M. Sanders, \$167.00
 December 11, 1895 paid by J. P. M. Sanders, \$500.00
 December 1, 1898 paid by Edmund Pendleton \$1500.00
 September 25, 1899 paid by B. F. Stanley, \$1274.43
 January 15, 1900 paid by W. E. Fulton, commissioner, being proceeds of real estate sold in equity proceedings to enforce payment of obligation sued upon, \$319.78
 February 10, 1900, paid by same, derived from same \$180.50

Pleas.

Filed March 26, 1902.

In the Supreme Court of the District of Columbia.

RICHARD W. SANDERS, Plaintiff,	} At Law. No. 45265.
<i>vs.</i>	
HENRY E. DAVIS, Defendant.	

1. Comes now the defendant in the above entitled cause, by his attorney, and for plea to the first count of the declaration in the said cause says: That there is not any record of the said supposed recovery in the said count mentioned remaining in the certain court in the said count mentioned, in manner and form as plaintiff has alleged, and this the defendant is ready to verify.

7 2. And for plea to the first and second counts of the said declaration, the defendant says: That the certain judgment in the first count of the said declaration mentioned was rendered upon and on account of a certain writing obligatory executed by the judgment defendants in the said count mentioned, including this defendant, being the same writing obligatory as in the second count of the said declaration mentioned, which said writing obligatory was executed by the said judgment defendants, including this defendant, on account of the purchase of certain lands in which the said judgment defendants were interested, as follows: The said judgment defendants Bolling, Sanders, Stanley and Caldwell to the extent of one-sixth each, and the defendants Powell, Pendleton, Davis and Galt to the extent of one-twelfth each, as the plaintiff at the time of the execution of the said writing obligatory knew, and the plaintiff advanced the certain sum in the said writing obligatory mentioned in such knowledge and on the understanding and agreement that the said several defendants were to be liable on account thereof in proportion to their several interests in the said

lands aforesaid, and not otherwise; and thereupon and thereafter the plaintiff, with the acquiescence of the said defendants, obtained the said judgment with the purpose and upon the understanding that the same should be enforced against the said lands and the said defendants, if at all, according to their several respective interests aforesaid, and not otherwise; and thereafter on the equity side of the court in which the said judgment was rendered, to-wit, the circuit court of the county of Wythe, State of Virginia, a court of competent jurisdiction, the plaintiff filed his bill of complaint against the said defendants, and each and all of them, including this defendant, to

8 enforce the said judgment; whereupon, in said court such due proceedings were had as that the said court adjudged, ordered and decreed that the plaintiff should recover his full judgment, to wit, six thousand dollars (\$6,000) with interest thereon, from April 3, 1893, subject to certain credits on account of principal aggregating \$667.24, as of date December 11, 1895, and that the said defendants were obligated on account thereof in the respective proportions aforesaid, and, furthermore, that the defendants Sanders, Stanley and Pendleton should pay the said judgment in the respective sums of \$2056.60, \$2148.56 and \$3087.68, reserving to the said last named defendants the right to enforce contribution from any of the others, and subject to any sums that might be credited on said judgment by reason of the sale of the said lands aforesaid, and further that unless the said defendants should pay off and satisfy in full the said judgment of the plaintiff, together with all interest and costs of suit, within thirty days from the rising of the court, the said lands should be sold at public auction for the satisfaction of said judgment. And thereafter, by due proceedings in that behalf, and under and in pursuance of said decree, the said lands were sold, and subsequently certain payments on account of the said judgment and the indebtedness for which the same was rendered, were made as follows: On December 1, 1899, the sum of \$1500; on December 25, 1899, the sum of \$1274.43; on January 15, 1900, the sum of \$319.78; and on February 10, 1900, the sum of \$180.50. And the said decree of the said court in the premises remains in full force,

9 unreversed and unappealed from, and the said defendants Sanders, Stanley and Pendleton are, and each of them is, wholly solvent and able to pay the said judgment, debt, interest and costs, in the proportion aforesaid; all which this defendant is ready to verify.

3. And for a further plea to the said second count of the said declaration, the defendant says: That after the making of the certain writing obligatory in the said second count mentioned, the plaintiff obtained a judgment thereon against the makers thereof in a court of competent jurisdiction, to-wit, the circuit court of Wythe county, in the State of Virginia, the same being a court of record of the said State and duly holden and having jurisdiction in that behalf of both the subject matter and the parties aforesaid.

4. And for a further plea to the first and second counts of the said

declaration, the defendant says: That after the making of the certain writing obligatory in the said second count mentioned, the plaintiff obtained a judgment thereon against the makers thereof in a court of competent jurisdiction, to-wit, the circuit court of Wythe county, in the State of Virginia, the same being a court of record of the said State and duly holden and having jurisdiction in that behalf of both the subject matter and the parties aforesaid; and thereafter, in the same court and on the equity side thereof, the plaintiff obtained a decree based wholly upon the said judgment, for the enforcement and execution thereof, against the makers of said writing obligatory and defendants in said judgment, in which said decree the said judgment thereupon and thereby became merged.

CHAS. COWLES TUCKER,
Attorney for Defendant.

10

Memorandum.

February 15, 1904.—Verdict for plaintiff for \$3728.06 with interest from February 3, 1903.

Supreme Court of the District of Columbia.

FRIDAY, *March 25th*, 1904.

Session resumed pursuant to adjournment, Hon. Harry M. Clabaugh, chief justice.

* * * * *

RICHARD W. SANDERS, Plaintiff,	} No. 45265. At Law.
<i>vs.</i>	
HENRY E. DAVIS, Defendant.	

Come now the attorneys for the respective parties herein, whereupon the motion for a new trial filed herein, having been argued and submitted to the court, it is ordered that said motion be, and the same is hereby overruled, and judgment on verdict is ordered:

Thereupon, it is considered and adjudged that the plaintiff herein, recover of the defendant herein the sum of three thousand seven hundred and twenty-eight dollars and six cents, with interest thereon from February 3rd, 1903, being the money as aforesaid, found payable by said defendant to said plaintiff by reason of the premises, together with his costs of suit to be taxed by the clerk and have execution thereof.

11 From the foregoing, the defendant by his attorney in open court, notes an appeal to the Court of Appeals of the District of Columbia, and prays that bond be fixed. Whereupon, it is ordered that the defendant shall furnish a bond herein to operate as a supersedeas, in the penalty of five thousand dollars, or if for costs only, in the penalty of one hundred dollars, with surety or sureties to be approved by this court.

Memoranda.

March 31, 1904.—January term prolonged 38 days and time to file transcript extended to May 18, 1904.

April 16, 1904.—Appeal bond, for costs, filed.

Supreme Court of the District of Columbia.

FRIDAY, *May* 13, 1904.

Session resumed pursuant to adjournment, Hon. Harry M. Cla-
baugh, chief justice, presiding.

RICHARD W. SANDERS, Plaintiff,	} No. 45,265. At Law.
vs.	
HENRY E. DAVIS, Defendant.	

Comes now the defendant herein by his attorney and presenting to the court his bill of exceptions taken during the trial of this cause—prays that the same be signed and made of record now for then, which is accordingly done.

12

Bill of Exceptions.

Filed May 13, 1904.

In the Supreme Court of the District of Columbia.

RICHARD W. SANDERS, Plaintiff,	} At Law. No. 45265.
vs.	
HENRY E. DAVIS, Defendant.	

Defendant's bill of exceptions.

At the trial of this cause the plaintiff, to maintain the issues on his part joined, offered and gave in evidence a judgment of the circuit court of Wythe county, in the State of Virginia, in the words and figures following, to-wit:

VIRGINIA:

In the Circuit Court of Wythe County.

Office judgments in the clerk's office of Wythe circuit court made final by operation of law this 26th day of February 1896, being the 15th day of February term 1896. R. W. Sanders against W. H. Bolling, J. W. Caldwell, J. J. A. Powell, Edmund Pendleton, B. F.

Stanley, H. E. Davis, and Alexander H. Galt and J. P. M. Sanders Judgment for \$6000.00 with legal interest from October 1st, 1891, till paid and \$16.26 cost. Homestead waived in bond sued upon. Credit by \$500.00 paid by J. P. M. Sanders, Dec'r 11th, 1895, and by interest paid to April 1st, 1893.

13 Thereupon the plaintiff offered and gave evidence tending to show that certain payments had been made on account of the indebtedness represented in and by said judgment, and upon which the same was rendered; and there the plaintiff rested.

Thereupon the defendant, to maintain the issues on his part joined, read in evidence the depositions on behalf of the plaintiff, given in cause No. 43842 at law, which by stipulation of the parties was authorized to be used herein, showing as follows:

On October 1, 1890, the defendant and seven others executed to the plaintiff their joint and several obligation, under seal, promising to pay the plaintiff on or before October 1, 1895, \$6.000 with interest payable semi-annually. Thereafter, the plaintiff brought suit upon the said obligation in the said circuit court of Wythe county against all the parties thereto, and obtained the judgment herein above set forth. There was no agreement by the plaintiff with any one to hold the parties to the said obligation liable for the payment of the same, in any other way than as in the said obligation expressed, and he looked to the signers of the obligation as responsible to him, as set forth therein, that is to say, jointly and severally; and he understood that the money loaned to the parties — the said obligation was for the purpose of paying for some land, but he knew nothing whatever of the interest any of the parties held in the purchase. The certain Stanley, Pendleton, and Sanders, parties to the said writing obligatory, are solvent. And thereupon further to maintain the issues on his part joined, the defendant offered and gave evidence as follows:

14 After the rendition of the said judgment, the plaintiff filed on the equity side of the circuit court of Wythe county his bill of complaint in the words and figures following, to wit:

15 To the Hon. Sam'l W. Williams, judge of the circuit court of Wythe Co.:

Humbly complaining sheweth unto your honor your orator R. W. Sanders that at the Feb'y term 1896, of the circuit court of Wythe county he recovered a judgment against W. H. Bolling, J. W. Caldwell, J. J. A. Powell, Edmund Pendleton, B. F. Stanley, H. E. Davis, Alexander H. Galt and J. P. M. Sanders for the sum of \$6000.00 with interest thereon from Oct. 189— and \$16.26 cost of same, the interest thereon however being paid to April 1st, 1893, a copy of which judgment is here filed and asked to be read. Your orator would state that an execution was duly issued from the clerk's office and has proved of no avail as nothing could be realized on it. Your orator would state that J. P. M. Sanders one of the above named parties holds the title to three valuable lots or parcels of land lying in the

corporate limits of the town of Wytheville Va. near the N. & W. railroad, that one of said lots or parcels was conveyed to said J. P. M. Sanders by J. C. Allison by deed dated 3rd Oct. 1890, a copy of which said deed is here filed and asked to be read, marked "A" that the other two said lots or parcels were conveyed to said J. P. M. Sanders by Wm. Burk and wife by deed dated 3rd Oct., 1890, a copy of which said deed is here filed and asked to be read, marked "B" Orator would state that by writing contemporary with said two deeds executed by the said J. P. M. Sanders and all of the above named parties against whom the judgment was recovered it was agreed and stipulated that the said J. P. M. Sanders should hold the legal title to said three lots or parcels of land in trust for the benefit of all the rest of said parties they each having paid or assumed their part of

16 the purchase price of the same, a copy of which writing is here filed and asked to be read, marked "C" Your orator would state that his said judgment is a prior lien on all of said lots of land, and that the same are liable in a court of equity to be subjected to sale to satisfy the same. Your orator is informed that the said parties are each the owners of other valuable real estate situated in Wythe Co. on which his said judgment is a lien but as to the exact location of said real estate your orator is not informed at present, Being without remedy save in a court of equity the prayer therefore of your orator is that W. H. Bolling, J. W. Caldwell, J. J. A. Powell, Edmund Pendleton, B. F. Stanley, H. E. Davis, Alexander H. Galt and J. P. M. Sanders be made parties defendants to this your orator's bill of complaint and that they be required to answer the same, an answer however under oath being here expressly waived, that your orator may have a decree for sale of the three said lots in the town of Wytheville to satisfy his said judgment and that your honor will grant such other further & general relief as to his case may seem meet and just and agreeable to equity and good conscience, and that process may issue against the several defendants above mentioned &c. and your orator will every pray &c.

FULTON & FULTON, P. Q.

The certain "Exhibit C" in the said bill mentioned is in the words and figures following, to-wit:—

17

"EXHIBIT C."

Whereas, John P. M. Sanders whose name is hereto signed, Bolling F. Stanley, William H. Bolling, Joseph W. Caldwell, John J. A. Powell, Edmund Pendleton, Alex. H. Galt & Henry Davis have purchased from John C. Allison a lot of about five acres of land in Wytheville for the price of five thousand dollars of which one sixth is to be paid by each of the four purchasers first above named, and one sixth by the said Powell and Pendleton the remaining one sixth by the said Galt & Davis & whereas by direction of said pur-

chasers said Allison has conveyed said lot by his deed bearing date the 3rd day of October 1890 to said John P. M. Sanders & whereas although said deed expresses no trust yet the same is in fact made & the title thereby conveyed is to be held by the said Sanders in trust for said purchasers in the proportion in which they are to share in the payment of the purchase money as aforesaid the intention & agreement being that said land is to be sold in lots as may be directed by said purchasers or their assigns & the deeds for the several lots sold to be made by said Sanders to the purchaser of the same as may be directed & the net proceeds of sale shared amongst said purchasers or their assigns in the same proportion as said price, Now I, John P. M. Sanders aforesaid, in consideration of the premises, do hereby make & deliver this as my deed to said other purchasers declaring the trusts above expressed.

Witness my hand & seal this 3rd Octo. 1890,

J. P. M. SANDERS. [SEAL.]

The above declaration also applies to the tract of land sold to the same purchasers by Wm. Burke & conveyed deed of said Burke & wife to said Sanders.

Witness my hand & seal this 3rd Octo. 1891

J. P. M. SANDERS. [SEAL.]

18 The defendant herein was not personally served with process upon the said bill. The original process has been lost, but the recollection of the clerk of the court is that service of process against the defendant herein was accepted by one Bolling as attorney for said defendant, but such fact does not appear in the transcript of the record of the cause. On September 25, 1896, the said circuit court of Wythe county passed the following decree in the said cause:

" R. W. SANDERS
vs.
W. H. BOLLING ET ALS. }

This cause came on this day to be heard upon the bill with exhibits of R. W. Sanders, process having been duly executed upon all the defendants therein named, and said bill being taken for confessed as to all of the defendants therein named, except B. F. Stanley, and upon the answer and cross bill of said B. F. Stanley, leave having been granted him to file the same, and the court without adjudicating any of the principles of this cause, awards process to the said B. F. Stanley against the defendant named in his cross bill returnable to rules and this cause not continued."

The separate answer and cross bill of the said Stanley was thereupon filed in the said cause, and the defendant herein being a non-resident, was proceeded against upon the said cross bill by publica-

tion. Thereafter the said cause after notice served upon all the defendants except the defendant herein and another was referred to a commissioner, with directions to take an account and to ascertain and report to the court, in accordance with the terms of the order of reference, which order the commissioner therein named
 19 duly observed, and made his report in pursuance of the reference thereby made. Whereupon, the following decree was passed in the said cause:

VIRGINIA:

At a circuit court continued and held for Wythe county at the court house on Friday, Sept. 30th, 1898.

Present: Same judge as on yesterday.

R. W. SANDERS
 vs.
 W. H. BOLLING & AJS. }

This cause came on again this day to be heard upon the papers formerly read and upon the report of Master Commissioner W. B. Kegley filed on the 31st day of August, 1898, the exceptions thereto, the depositions of witnesses and exhibits filed therewith, the answer of Edmund Pendleton to the cross bill of B. F. Stanley filed in this cause with replication thereto replication to the answer of J. P. M. Sanders to said cross bill and was argued by counsel. Upon consideration of all which and the issues made upon the cross bill and answers thereto, the court doth overrule all exceptions to said report of Com'r Kegley and doth adjudge order and decree that the same be confirmed. And in accordance with the finding of said com'r, the court doth adjudge order and decree that R. W. Sanders do recover of all the parties defendants his full judgment to-wit:—\$6,000.00 with interest thereon from April 3, 1893, subject to credits aggregating \$667.24, as of date Dec. 11, 1895, filed as an exhibit in this cause and costs of same and if all of the parties were solvent that as among themselves, they should contribute thereto in the following proportion, viz:—

J. P. M. Sanders	\$512.74
B. F. Stanley	604.70
W. H. Bolling.....	1543.82
Jos. W. Caldwell.....	1666.37
Powell and Pendleton	1543.82
Galt and Davis	1666.37

But it appearing to the court that all of the above named
 20 parties are insolvent except those immediately hereinafter named, the court doth adjudge order and decree that the following named parties contribute to the sum in the following proportion, namely:—

J. P. M. Sanders.....	\$2056.60
B. F. Stanley... ..	2148.56
Edmund Pendleton.....	3087.68

reserving to them the right to enforce contribution from any of their associates above named, if by any means, anything can be made out — them by legal process, and subject to any sum that may be credited on said debt by reason of the sale of the lands hereinafter provided for.

The court being further of opinion that the sale of the real estate set out in the bill in this cause is necessary, doth accordingly adjudge order and decree that unless the defendants pay off, satisfy in full the judgment of the plaintiff, set up in the bill together with all interest and costs of suit within thirty days from the rising of this court, that then Wm. E. Fulton, who is appointed the court's com'r for the purpose do sell at public auction at the front door of Wythe court house the lots or parcels of land conveyed to J. P. M. Sanders by J. C. Allison and by Wm. Burke and wife by deeds dated Oct. 3rd, 1890, after duly advertising the same for four successive weeks by printed hand bills, duly posted. He will sell for so much cash as will pay the costs of suit, commissions and costs of sale and for the balance upon a credit of one and two years, purchaser being required to execute bond for the deferred payments, bearing interest from day of sale, with approved security. Before acting under this decree Commissioner Fulton will execute bond before the clerk of this court with approved security, conditioned according to law for his faithful performance as such com'r in the penalty of \$1000.00 and this cause is continued.

21 Thereafter, the commissioner named in the said decree duly reported the sale of the real estate therein named, which was confirmed by the court; the notice to confirm having been returned as to the defendant herein "not to be found."

Thereafter, in the said cause, the plaintiff filed his further and amended bill of complaint in the words and figures following, to wit:

22 *The Amended Bill of R. W. Sanders to the O. B. in the Chancery Suit of R. W. Sanders vs. Edmund Pendleton, W. H. Bolling, and Others.*

Adopting the whole of the original bill as a part of this amended bill, orator would respectfully set forth the following state of facts in this his amended bill.

Orator secured judgment in your honor's court at the — term, 189— against E. Pendleton, W. H. Bolling, J. J. A. Powell, B. F. Stanley, Jos. A. Caldwell, Henry C. Davis, Alexander Galt and J. P. M. Sanders for the sum of \$— which *was* said judgment was duly dock-

eted in the judgment lien docket of Wythe county court and is a lien upon all the real estate of said parties.

Your orator charges that Edmund Pendleton and J. P. M. Sanders and J. W. Caldwell have valuable real estate in Wythe county, and that B. F. Stanley did have, at the time this judgment was docketed valuable real-estate in his own name, also both in Wythe and Smythe. Orator also charges that there is property belonging to some of the parties which was not capable of being levied on upon which orator's judgment is a lien.

Orator charges that B. F. Stanley after this judgment had become a lien on his real estate conveyed all of his real-estate to W. L. Stanley both in Wythe and Smythe, that no valuable consideration passed for the same, that the said conveyances were made to hinder, delay and defraud his creditors and that the said conveyances were fraudulent in fact.

That they — made either pending this litigation or after the judgment was obtained with full knowledge of W. L. Stanley att'y for B. F. Stanley during the pending of suit and rendition of judgment and that they were made particularly to hinder, delay and defraud your orator in the collection of his judgment aforesaid. Your orator herewith files certified copies of these conveyances both in Smythe and Wythe, and asked that the same may be made exhibits marked "A & B" to be read as a part of this amended bill.

23 Orator is advised that by reason of said judgment he has a right to have so much of said conveyances set aside as may be necessary to pay the portion of orator's judgment which said Stanley is liable for.

Orator would farther show that on the 24th. day of August, 1892, B. F. Stanley and wife conveyed to D. K. Gibboney and wife, G. R. Huffard and W. H. Spiller, trustees to secure to the Wytheville Building and Land Fund Association \$600.00 two acres on the south side of the rail-road in Wytheville, Va. and office copy of which is hereby filed as Exhibit "C" and asked to be read as a part of this bill. B. F. Stanley and wife on April 7th, 1894 also conveyed to Chas. Bumgardner, trustee, to secure the Baltimore Building and Loan Association \$500.00 four acres on the west side of the McAdam road, Wytheville, Va. a certified copy of which is hereby filed as Exhibit "D" and asked to be read as a part of this amended bill. Also B. F. Stanley and wife conveyed to W. L. Stanley, trustee, to secure the Baltimore Building and Land Fund Association \$400.00 two lots of land, first one and one eight- miles south east from Wytheville near R. R. containing one half acre, second—a lot adjoining the first, dated Sept. 2nd, 1895, a certified copy of which is herewith filed as Exhibit "E" and asked to be read as part of this bill, also W. L. Stanley and wife conveyed to G. R. Huffard, J. G. Brown and W. H. Spiller, trustees to secure the Wytheville Building and Land Fund Association the sum of \$500.00 a lot of land on the south side of the N. & W. R. R. known as the Jensey Hussey lot date- Jan. 17th, 1898, a certified copy of which is

herewith filed as Exhibit "F" and asked to be read as a part of this bill.

Your orator charges that a large amount of the indebtedness secured by these trusts deeds has been paid but orator is not advised as to the amount and calls for proof of said debts now due.

Orator further charges that the conveyance made by W. L. Stanley and wife to G. R. Huffard *et als.* trustees, was made after the rendition and docketing of orator's judgment.

24 Orator would state that Jos. W. Caldwell did on the — day of — 189— convey to the East End Land Co., a tract of land in the south eastern portion of Wytheville containing — acre and in the same reserved a *lein* for the sum of \$— a certified copy of which deed is herewith filed as Exhibit "H" and asked to be read as a part of this bill, as will be seen the lien was afterwards marked satisfied. The East Land Co. divided up its lots among its stockholders and the said Jos. W. Caldwell released the lien against the said Co. and agreed to take a trust deed on the individual lot of each stock holder for the amount still unpaid by the stock holder. The conveyance then to be made by Jos. W. Caldwell, president, no conveyances have been made to the following stockholders and no deeds of trust given by them. H. D. C. Burford, who owed \$520.00, W. C. Sanders who owed \$530.00, W. L. Yost, who owed \$515.00, C. W. Pike who owed \$520.00 J. J. A. Powell who owed \$550.00 and H. G. Wadley who owed \$530.00 all as of November 21st, 1891. Jos. W. Caldwell owed \$565.00 as of the same date.

Orator charges that the land not conveyed to these parties is still subject for these sums to the purchase money lien of Jos. W. Caldwell and that your orator has a lien on said sum still due the said Jos. W. Caldwell, and has a right to collect the same or sell the land and apply the proceeds to the amount due orator by the said — Orator further states that Jos. W. Caldwell and wife gave a deed of trust to A. A. Campbell, trustee to secure Jennie Dawson and R. C. Kent the sum of \$6,000 on his home place, situate south of the Norfolk and Western R. R. in Wytheville dated the — day of —, 18—, a certified copy of which is herewith filed as Exhibit "I" and asked to be read as a part of this bill.

Orator does not know what part of said debt has been paid and calls for proof of debt. Orator would further state that the land owned jointly by the parties defendants in the original suit has been subjected to the debt, sold and the sale confirmed, the amount to be credited on his judgment is \$— to be apportioned according to the amount found to be due in the decree entered at the Sept.

25 term, 1898. That decree also shows the exact amount due by each of the parties.

Orator will further state that J. P. M. Sanders is the owner of a valuable farm on New river in this county inherited from his father; that Edmund Pendleton is the owner of valuable real-estate situate about a mile east of Wytheville purchased from the heirs of Chas. W. Kent deceased and Mrs. Ann Kent; that B. F. Stanley

was the owner of four tracts of land in and around Wytheville and a certain parcel of land in Smythe all of which have been conveyed after the rendition of this judgment to his son W. L. Stanley without consideration and that Jos. W. Caldwell is the owner of the purchase money interest in the lands heretofore described, and a place in the south of Wytheville upon which he resides purchased from J. Stuart Crockett. The prayer therefore of orator's bill is that so much of J. P. M. Sanders' land may be subjected to sale as may be necessary to satisfy the amount still due orator by him, that so much of Edmund Pendleton's land may be sold as may be necessary to satisfy the amount due by him; that the conveyances of B. F. Stanley to W. L. Stanley may be declared fraudulent and void, to as much land as may be necessary to be sold to satisfy the amount found due by him to orator—that the interest owned by J. W. Caldwell in the amount due for balance of purchase money for land in the east end of Wytheville may be first *be* subjected to pay the amount found due by him to orator, that the land may be sold and the proceeds applied to payment of the said amount and in the event that this may not be sufficient that then the interest that J. W. Caldwell may have in the home place may be subjected; that Edmund Pendleton, W. H. Bolling, J. P. M. Sanders, J. W. Caldwell, J. J. A. Powell, B. F. Stanley, Henry C. Davis, Alexander Galt, H. D. C. Burford, W. T. McNut, adm'r of W. L. Yost, dec'd, C. W. Pike, W. C. Sanders, C. R. Boyd, H. G. Wadley, The East End Land Co., W. L. Stanley in his own right and as trustee, M. L. Stanley, Wytheville Building and Land Funs (Association), D. K. Gibboney, trustee, G. R. Huffard, trustee, J. G. Brown, trustee, W. H. Spiller, trustee, Baltimore Building and Loan Association, Chas. Bungardner, trustee, A. A. Campbell trustee, Jennie Lawson and

26 R. C. Kent be made parties defendant to this bill and be required to answer the same, but an answer under oath is hereby waived as is provided by statute, that the court's spa. in chancery may issue against the resident defendants, that there may be an order of publication as to non-residents, H. G. Wadley, C. W. Pike, H. D. C. Burford, Henry C. Davis, Alexander Galt and the Baltimore Building and Loan Association, and that your honor will grant unto your orator all such other further and general relief as to a court of equity belongs and as is meet and proper in the premises Your orator will ever pray *ect.*

27 The defendant herein was not served with process on the said amended bill, and did not appear thereto in person or by counsel, but was proceeded against thereon by publication; and thereafter, such other and further proceedings were had in the said cause as that on March 6, 1899, the said circuit court of Wythe county rendered its further decree in the words and figures following, to wit:

28 This cause came on this day to be heard upon the papers heretofore read therein in the original cause, the orders and

decrees heretofore entered, the amended bill filed at rules, the exhibits filed therewith, the joint and separate answer of B. F. Stanley and W. L. Stanley to the amended bill, replication to said answers and arguments of counsel, upon consideration of all which it appearing to the court that process on the amended bill had been duly executed on all the resident defendants and the order of publication has been duly published according to law as to all the non-resident defendants and their all failing to appear and answer, except the said B. F. Stanley and W. L. Stanley, the said amended bill is taken for confessed as to all of them. And the said B. F. Stanley and W. L. Stanley having answered and acknowledged that they are willing that the real-estate conveyed by B. F. Stanley to W. L. Stanley by deeds dated the one 2nd., March, 1896 conveyeing lands in Smythe county and the other dated 25th, Feb. 1896, conveying lands in Wythe shall be subject to lien of complainant's judgment, it is accordingly adjudged ordered and decreed that said judgment be and the same is and shall constitute a valid and subsisting lien on said real-estate, the same as if said deed from B. F. Stanley to W. L. Stanley had never been executed and they are liable to be subjected to a sale to pay the same. It is further adjudged, ordered and decreed that complainant's judgment is a valid lien against the real estate set out in the amended bill owned by the defendants J. P. M. Sanders, Edmund Pendleton and J. W. Caldwell and that the same is *laible* to be subjected to sale to pay the same.

As to the land conveyed by J. W. Caldwell to the East End Land Co. and which appears from the amended bill and the exhibits filed was delivered up among the stockholders of said company, to wit:— H. D. C. Burford, W. C. Sanders, W. L. Yost, C. W. Pike, J. J. A. Powell, H. G. Wadley and said J. W. Caldwell and for which they each and all owe a balance of purchase money, which it appears is due and
 29 going to the said J. W. Caldwell, the original owner of said lands, it is the court's opinion that said sums so due from each of said parties is liable for complainant's judgment and the same is so condemned in the hands of said parties subject to prior liens, if any and the said lots so assigned to said parties are liable to — subjected to sale to pay the amount due from each of said parties to the said J. W. Caldwell and the court doth so adjudge, order and decree, the court is further of the opinion that an account is necessary in this cause, the court doth accordingly adjudge, order and decree that E. Lee Trinkle, who is hereby appointed a special commissioner for the purpose do after giving due notice to the parties, take and state an account showing the liens, the amount and priority of same against the real-estate owned by the defendant B. F. Stanley and which was conveyed to W. L. Stanley by two deeds above referred to and any other real-estate the said B. F. Stanley may own, the liens the amount and priority of same against the real-estate owned by the defendants, J. P. M. Sanders, Edmund Pendleton and J. W. Caldwell.

Second. The lots and the number, — acres in each which *was* as-

signed or allotted to H. D. C. Burford, W. C. Sanders, W. L. Yost, C. W. Pike, J. J. A. Powell, H. G. Wadley, and J. W. Caldwell. Amount due from each of said parties on said lots, the liens, if any, and the priorities on the amounts so due—

Thirdly. The amounts if anything, that have been paid by any of the defendants to the original bill on the judgment of complainant since the report of Commissioner Kegley filed in said cause—

Fourthly. He will ascertain and report the rental value of the real-estate owned by any of the defendants and whether the same will pay off and satisfy the liens reported against the same in five years—

Fifth. He will ascertain and report any other matter that he may deem pertinent or that any of the parties to the cause may require and he will report his proceedings to the next term of this court.

And this cause is continued.

30 Thereafter, the commissioner in the said decree named duly reported in accordance with the directions of the said decree.

And the defendant, further to maintain the issues on his part joined, offered and gave evidence as follows:

The plaintiff's understanding was that he had the right to collect the whole judgment aforesaid from any one of the obligors that were solvent, and he has not proceeded to collect the full amount thereof from the aforesaid Stanley, Pendleton, and Sanders, parties thereto, because he did not particularly need the money, and considered it a very good investment. He has not collected the whole judgment from said Stanley, Pendleton, and Sanders, because they have voluntarily paid a portion of the debt, and the defendant herein has not paid any. The plaintiff's reason for going to the expense of prosecuting this cause, when he could collect the judgment in the suit pending in the said circuit court of Wythe county without additional cost and expense, is that, as he understands, the solvent obligors are liable to him for the whole amount. He does not expect the prosecution of this suit to cost him anything. In answer to the question whether, while the full amount of the judgment has not been paid to him, he really looks to the said Stanley, Pendleton and Sanders for its payment, and this suit against the defendant herein is in reality being prosecuted for the benefit of those parties, the plaintiff answered that he looks to all the solvent obligors for the payment of that debt, knowing that the parties above named are responsible if he recovers nothing from the others, and that he supposed he might answer that by saying that this suit is prosecuted for their benefit, for if the defendant herein does not pay it, they will have

31 to. In answer to the further question whether he has any writing or agreement with the said Stanley, Pendleton and Sanders by which they bind themselves to him as to the collection of the debt from the defendant herein further than that they are bound as solvent residents of Virginia on their bond to him and

his judgment against them, the plaintiff answered, no, that he had no agreement whatever.

The certain Sanders, who is one of the obligors, in the said obligation, is the plaintiff's brother; and the certain declaration of trust set forth as Exhibit C to the plaintiff's original bill in equity in the said circuit court of Wythe county, was duly executed by said Sanders, party to the obligation and judgment aforesaid.

The said Pendleton, party to the said obligation, testified that there was no agreement between the parties thereto as to the proportion of the debt each would have to pay, and that there was no understanding or agreement at the time the money was borrowed that the obligors in the bond should pay in proportion to their interest in the land. Fulton, the commissioner, hereinbefore appearing to have been appointed for the purpose of selling the real estate herein before referred to in the chancery suit aforesaid, testified that he had duly sold the same, and that the balance of \$660.12 remaining after the payment of expenses under the decree of the court, he paid to the plaintiff herein, that being the full net proceeds of the sale of the said land.

The foregoing is the substance of all the evidence offered and given at the trial. Thereupon, the plaintiff, by his counsel, requested the justice presiding to direct the jury that according to the evidence offered and given the plaintiff was entitled to recover, which request, the said justice, over the objection of the defendant, by his counsel, granted, and directed the jury accordingly;
32 — which action of the said justice, the defendant, by his counsel, duly excepted, and the justice presiding noted such exception on his minutes before the jury retired to consider of its verdict.

The defendant prays the court to sign this his bill of exceptions in the premises, which is accordingly done this 13th day of May, A. D. 1904.

HARRY M. CLABAUGH,
Chief Justice.

Settled by consent:

BRANDENBURG & BRANDENBURG,
For the Plaintiff.

E. S. McCALMONT,
For the Defendant.

Memorandum.

May 13, 1904.—Time to file transcript further extended to June 6, 1904.

33 *Directions to Clerk for Preparation of Record.*

Filed May 23, 1904.

In the Supreme Court of the District of Columbia.

RICHARD W. SANDERS, Plaintiff,	}	Law. No. 45265.
vs.		
HENRY E. DAVIS, Defendant.		

To the clerk of said court :

Please include in the transcript of record on the appeal in the above entitled cause the following, being all the papers in said cause necessary for the hearing of the said appeal, and transcribe and certify the same as the record in the said cause, namely :

1. The declaration.
2. The pleas of the defendant.
3. The bill of exceptions.

E. S. McCALMONT,
Attorney for Defendant.

Messrs. Brandenburg & Brandenburg, attorneys for plaintiff:

Please take notice that the foregoing notice or order has been delivered to the clerk of the supreme court of the District of Columbia in the above entitled cause.

May 23, 1904.

E. S. McCALMONT,
Attorney for Defendant.

O. K.

BRANDENBURG & BRANDENBURG,
Att'ys for Pl'tff.

34 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA, }
District of Columbia, } ss :

I, John R. Young, clerk of the supreme court of the District of Columbia, hereby certify the foregoing pages, numbered from 1 to 33, inclusive, to be a true and correct transcript of the record, as per directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 45,265, at law, wherein Richard W. Sanders is plaintiff, and Henry E. Davis is defendant, as the same remains upon the files and of record in said court.

Seal Supreme Court of the District of Columbia. In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 4th day of June, A. D. 1904.

JOHN R. YOUNG, *Clerk*.

Endorsed on cover: District of Columbia supreme court. No. 1436. Henry E. Davis, appellant, vs. Richard W. Sanders. Court of Appeals, District of Columbia. Filed Jun-6, 1904. Henry W. Hodges, clerk.

COURT OF APPEALS,
DISTRICT OF COLUMBIA.
FILED

JAN 23 1905

Henry W. Rodgers,
clerk

In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1904.

1436

HENRY E. DAVIS, APPELLANT,

vs.

RICHARD W. SANDERS, APPELLEE.

BRIEF FOR APPELLANT.

E. S. McCALMONT,
For Appellant.

In the Court of Appeals of the District of Columbia.

JANUARY TERM, 1904.

HENRY E. DAVIS, APPELLANT,

vs.

RICHARD W. SANDERS, APPELLEE.

BRIEF FOR APPELLANT.

I.

Statement of the Case.

This was an action at law in which the appellant was the defendant. The material facts necessary here may be stated as follows:

On the first of October, 1891, the appellant and seven others, among whom were J. P. M. Sanders, a brother of the appellee; B. F. Stanley and Edmund Pendleton, executed a joint and several bond whereby they promised to pay to the appellee six thousand dollars on or before the 1st day of October, 1895, with legal interest. The bond not having been paid at maturity, the appellee brought suit upon it against all the obligors in the Circuit Court of

Wythe County, Virginia, and on the 26th day of February, 1896, obtained judgment against them for the full amount, with interest and costs, less a few payments on the interest.

After the rendition of the judgment the appellee began a suit on the equity side of the Circuit Court of Wythe County against all the obligors of said bond, setting forth the recovery of judgment on the bond, the fruitless suing out of executions on the judgment, the ownership of certain lots in the town of Wytheville, Virginia, by the defendants, that title thereto was in J. P. M. Sanders, one of the defendants, in accordance with an agreement among all of the defendants, a copy of which was filed, etc., and praying a sale of the lots and for general relief.

The consideration of the joint and several bond was a loan from the appellee to the obligors to enable them to pay for the lots mentioned in the bill in equity purchased by them from a third party. While there was no agreement by the appellee with anyone to hold the parties to the bond liable for the payment of the same in any other way than as in the obligation expressed, and no knowledge on his part at the time of the proportion of interest of each obligor in the purchase, there in fact was, as between the obligors, an understanding in writing that four of them were owners of one-sixth each of the purchase, and the other four, the appellant being one of them, of one-twelfth each. A copy of this understanding in writing was filed by the appellee with his bill in equity and made a part thereof.

The appellant is a resident of the District of Columbia, and was not personally served with process upon the bill of complaint. The original process has been lost, but the clerk of the Circuit Court of Wythe County testified in this cause that it was his recollection that service of the

process in the equity suit against the appellant was accepted by one Bolling as attorney for him.

Under the laws of Virginia as in effect at the time the equity suit was begun, a levy could not be made by the appellee under execution issued on his judgment at law on the lots mentioned in his bill in equity. The suit in equity, though primarily in aid of execution at law, was nevertheless, by the law of Virginia, also for the purpose of determining what estates of the defendants should be subjected to execution and for what proportions of the judgment. The bill was taken as confessed against all of the defendants except one B. F. Stanley. Stanley filed a separate answer and a cross-bill, and the appellant was proceeded against upon the cross-bill by publication. The cause was referred to a commissioner with directions, who duly reported. On the 30th of September, 1898, the Court passed a decree which adjudged and decreed:

1. That the appellee should recover from *all* of the defendants his full judgment, \$6,000.00, with interest thereon from April 3, 1893, subject to certain credits.

2. That the defendants as among themselves should contribute in proportions as stated.

3. But that as all the defendants appeared to be insolvent in fact or in law, except defendants J. P. M. Sanders, B. F. Stanley and Edmund Pendleton, they should contribute the entire amount *in certain proportions set forth*.

The decree then reserved to J. P. M. Sanders, Stanley and Pendleton the right to enforce contributions from their associates.

The appellee's evidence in the case below showed that J. P. M. Sanders, B. F. Stanley and Edmund Pendleton are solvent, and that he did not sue the appellant in this juris-

diction through any doubt he had of the validity of their obligation to him under the Virginia decree, nor through any fear of not being able to collect his entire debt from them, but because they had voluntarily paid a portion of the debt, and the appellant had not, and that even if unsuccessful here, he knew they would have to pay there.'

II.

Assignments of Error.

The Court below erred:

1. In directing a verdict for the appellee.
2. In not directing a verdict for the appellant.
3. In not holding that the appellee by his suit in equity in Virginia had elected a remedy and manner of enforcing his judgment which precluded him from any other action until such suit should have been prosecuted to execution according to the relief therein obtained by him.
4. In not holding that the appellee was barred of his right to bring this action by reason of the terms of the decree obtained by him in Virginia, and the fact that such decree was effectually executable according to its terms against other parties thereto than the appellant.

III.

Argument.

The declaration contains three counts. The first is on the judgment of the Circuit Court of Wythe County, the second is on the bond on which that judgment was obtained, and the third contained the common counts in as-

sumpsit. On the trial it was conceded by the plaintiff that no judgment could be given under the third count, and it was likewise conceded in the argument that the obligation on the bond was extinguished by the judgment. If not, the authorities are abundant and uniform to that effect.

Am. & Eng. Ency. of Law, Vol. 20, p. 599.

U. S. v. Price, 9 Howard, 83.

Sessions v. Johnson, 95 U. S. Rep., 347.

Schuyler v. Israel, 120 U. S. Rep., 508.

The defendant contended unsuccessfully at the trial, and now contends, that the judgment obtained by the plaintiff in the Circuit Court of Wythe County, Virginia, was merged in and extinguished by the decree of said Court in the equity suit mentioned, and that as a consequence that judgment could not be sued on here.

In the first place there is no difference between a judgment at law and a decree in equity for the payment of money so far as application of the doctrine of merger is concerned.

Black, in his work on Judgments, says (Sec. 982) :

"It is now well settled that ^{an} ~~no~~ action of debt will lie in a court of law upon the decree of a domestic court of chancery in all cases where such decree directs the payment of a fixed, liquidated, and absolute debt in money."

Evans v. Tate, 9 Serg. & R., 252.

Thrall v. Waller, 13 Vt., 231.

Williams v. Preston, 3 J. J. Mar., 600.

Pennington v. Gibson, 16 How., 65.

Nations v. Johnson, 24 How., 203.

Ames v. Hoy, 12 Cal., 11.

Post v. Neafie, 3 Caines, 22.

People v. Sturtevant, 9 N. Y., 263.

Tilford v. Oakley, Hempst., 197.
McKim v. Odom, 12 Me., 94.
Insurance Co. v. Newton (N. J.), 14 Atl., 756.
Warren v. McCarthy, 25 Ill., 95.
Blattner v. Frost, 44 Ill. App., 580.
Shainwald v. Lewis, 69 Fed., 487.
Moore v. Adie, 18 Ohio, 430.

And again in Section 675:

“A decree in equity for the payment of money merges the original debt in the same manner and to the same extent as a judgment at law.”

This being so, authorities showing that a judgment sued on merges in and is extinguished by a judgment thereon are in point.

Am. & Eng. Ency. of Law (2d Ed.), Vol. 20, p. 600.

Am. & Eng. Ency. of Law (2d Ed.), Vol. 17, p. 808.

Freeman on Judgments, Secs. 216, 338.

Black on Judgments, Sec. 675.

Gould v. Hayden, 63 Ind., 443.

Bertram v. Waterman, 18 Iowa, 530.

Purdy v. Doyle, 1 Paige (N. Y.), 558.

Johnson v. Hesser (Neb., 1901), 85 N. W. Rep., 894.

Price v. First Nat. Bank, 62 Ky., 735.

Chilty v. Glenn, 3 T. B. Monroe (Ky.), 425.

Turner v. Stewart, 51 W. Va., 505.

McCredy v. Thruds, 56 N. Y. Sup., 68.

Ins. Co. v. Newton, 50 N. J. Law, 571.

Freeman, in his work on Judgments, Sec. 216, says:

“The weight of authority in the United States shows that whatever may be a cause of action will, if recov-

ered upon, merge into the judgment or decree. A contract by specialty merges into a judgment in the same manner as a simple contract. A judgment is extinguished when, being used as a cause of action, it grows into another judgment. It may even be merged by a statutory judgment."

And again

"The new judgment, though inferior as an instrument of evidence to the old one, and not attended by the same liberal jurisdictional presumption, ought, nevertheless, to entirely supplant the old one, because it is the most recent judicial determination of the rights of the parties, *and because the plaintiff has voluntarily elected to abandon his former judgment to secure one which, though in an inferior court, is conclusive in favor of the continuance and amount of his claim.*"

Referring to the objection that merger does not take place until a higher remedy or evidence is created, Freeman says:

"The effect of this rule would be that the estate of the debtor could be involved by a multiplicity of record liens, and his chattels seized under a great number of executions, and himself financially ruined by the expenses of divers proceedings, all based upon a single and indivisible demand."

In delivering judgment in the case of *Gould v. Hayden*, *supra*, the Court, by Ch. Justice Howk, said:

"The plaintiff, of course, controls his judgment. He may enforce its collection by the process of the Court in which he obtained his judgment, or he may, if he may elect to do so, use his judgment as an origi-

nal cause of action, and bring suit thereon in the same or in some other court of competent jurisdiction, and prosecute such suit to final judgment. This procedure he may pursue as often as he elects, using the judgment last obtained as a cause of action on which to obtain the next succeeding judgment; but the very freedom with which this may be done, *ad infinitum*—and we know of no law or legal principle which would prevent its unending repetition—is, to our minds, a convincing and conclusive reason why each successive personal judgment ought to and must be regarded as a complete merger and extinguishment of the preceding judgment, with all its qualities and incidents. Each successive personal judgment is a new ‘debt of record,’ in which the precedent debt, though theretofore evidenced by a judgment, is as completely merged and absorbed as it would have been if it had been evidenced by note, bill, bond or other evidence of debt. If the precedent judgment is merged, as we think it must be, in the succeeding judgment, then it follows of necessity, as it seems to us, that the former judgment is completely extinguished. It has ceased to exist for any purpose; it cannot be used again as the foundation of another action, and all its qualities and incidents are lost and swallowed up in the judgment obtained thereon.”

The judgment against the appellant is for the entire amount of the original obligation, less payments that have been made. As between himself and his co-obligors in the bond, barring any other defense he may have against them, he is liable for only a proportionate amount of the debt. The result, if he is obliged to pay this judgment, is to drive him back to Virginia to litigate there with his co-obligors. A recognition of the doctrine of merger as contended for by the appellant will not release him from his obligation, but will simply require the pursuit of the remedy reserved

in the decree of the Wythe County Chancery Court. When the appellee obtains payment of his debt under that decree, those who pay may pursue their remedy against the appellant, but he will then have a right to set up against them any proper defense he may have to diminish or bar their demand which he is unable to present here.

The doctrine of merger as contended for rests on the sound principle that it is to the interest of the State that there should be an end of litigation, and that creditors should not have the power to harrass and impoverish debtors by a multiplicity of suits. In this case the appellee has not even the plausible complaint against the justice of the doctrine that its application would bar the prospect of the collection of all that is due him, for he admits that he can collect at any time under his Virginia decree.

The fact also that his debt is secure under that decree, and notwithstanding that he is willing to incur the trouble and expense of this litigation, would seem to indicate that the appellee's suit is influenced by his feelings to punish the appellant rather than for the purpose of obtaining his money. This is precisely what the doctrine of merger as contended for is designed to prevent. Courts are not open in order that unnecessary annoyance may be meted out by one against another, and not only is the doctrine of merger designed to prevent this, but also, in a measure, those of election of remedies, estoppel and *res judicata*.

Respectfully submitted,

E. S. McCALMONT,
For Appellant.